IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No 1 of 1997

with

CRIMINAL APPEAL No. 938 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

KANTILAL GHELABHAI PATEL

Appearance:

1. Criminal Confirmation Case No. 1 of 1997
Mr. S.R. Divetia, A.P.P P.P. for Petitioner
M/S. THAKKAR ASSOC. for Respondent.

2. Criminal Appeal NO.938 of 1998
M/S.THAKKAR ASSOC. for Petitioner
Mr. S.R. Divetia, A.P.P.for Respondent.

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 15/09/98

ORAL JUDGEMENT

The Registry having received the R & P of judgment and order dated 12th September, 1997 in Sessions Case no.150 of 1995 have registered this confirmation case under subsection 1 of Sec.366 of the Code of Criminal Procedure, 1973 (" Code" for short) for confirmation of sentence of death having found the accused appellant in Criminal Appeal no.938 of 1997 guilty of offence punishable under S. 302 of the Indian Penal Code. By the said order, the learned Sessions Judge has ordered sentence of death and to be hanged by neck till his death. The accused being aggrieved has filed the above referred appeal against the said judgment and order of conviction. As both i.e. Confirmation Case no.1/97 and Criminal Appeal no.938/97 arise from the same judgment and order they are heard together and disposed of by this common judgment.

The facts of the prosecution case are as under:

The accused had married with one Manjulaben daughter of Hirabhai Pirjabhai PW 5. The accused belonged to village Chhatar and his wife Manjulaben belonged to village Vavdi which is at a distance of about 7 Kms. from Chhatar. Both of them had a child aged about three years at the relevant time and they were staying at Surat and the accused was doing the work of cutting diamonds. It is the case of the prosecution that in the evening of 12th September, 1995 the accused and his wife Manjulaben left Surat informing his cousin and neighbour that they are going to attend some Katha at the place of some acquaintance. They locked their house and handed over the keys to the neighbour. Their child named Divyesh had gone with his uncle Tulsibhai and was likely to return on that night. Till the next day morning, it appears that the accused and his wife Manjulaben did not return and therefore cousin Ketan inquired near about and informed the relatives at Chhatar also. On 14th September, 1995 Mr. Mahesh PW 3 an employee of Sunil Guest House near ST Bus Stand informed his master PW 2 Chisandas that on opening room no.18 he found the articles of that room in a scattered condition and on searching in the bathroom dead body of Manjulaben who had stayed in that room is lying. On receiving this information Chisandas went to room no.18, verified the fact, accordingly informed the police at 11.20 a.m. and registered the offence against Rameshbhai Virjibhai of Mota Ankadia, Tal: Kukavav, Dist: Amreli being CR I 414/95 . Investigation was

commenced by Ravaliya PW 17 which was then handed over to Bhagwanbhai Tababhai Vaja, Police Inspector, Junagadh. On completion of the investigation, he submitted chargesheet before Judicial Magistrate,First Class, Junagadh, who in his turn committed the case to the court of Sessions at Junagadh where it is numbered as Sessions case no.150/95. The said chargesheet is submitted against the present accused Kantilal as in the course of investigation it was found that this Kantilal is an imposter and has stayed in the guest house with the false name of Rameshbhai.

The learned Sessions Judge framed charge against the accused under S.302 of the Indian Penal Code to which the accused pleaded not guilty and claimed to be tried. The prosecution led necessary evidence to prove the charge against the accused. The defence has not examined any witness and the learned Sessions Judge after hearing the parties held accused guilty of an offence punishable u/S.302 of the Indian Penal Code and awarded capital punishment and sent the matter to this court for confirmation u/S.366(1) of the Code.

Before we proceed in the matter, we may make it clear that in the course of hearing, learned P.P. has filed Criminal Miscellaneous Application no.1400/98 under subsection 1 of Section 367 for permitting the prosecution to lead additional evidence. This Court by its order of 24th April, 1998 did permit the prosecution to lead additional evidence and accordingly the R & P was sent back to the Sessions Court, Junagadh which in its turn recorded the evidence and sent the matter back to this Court. After receipt of the said additional evidence we have heard the learned Advocates for the accused as well as prosecution afresh.

Learned Advocate for the appellant accused has very seriously and strenuously contended before us that though the learned Sessions Judge has held that there is no direct evidence to hold the accused guilty and rightly so but has held the accused guilty only on circumstantial evidence having erred to that a complete chain is formed by the circumstances which are consistent only with the hypothesis of guilt of the accused. Learned Advocate Mr. Thakkar contended that mainly there are two circumstances relied on by the prosecution, namely, (1) last seen together by the owner of guest house i.e. PW 2 and his employee PW 3 and (2) extra judicial confession made by the accused before his father-in-law Hirabhai PW 5 and Arjan Shamji, Sarpanch of the village who accompanied Hirabahi. Mr. Thakkar further contended that the

circumstances relied on by the learned Judge as narrated in paragraph 41 of the judgment are mainly based on these two circumstances. Mr. Thakkar therefore contended that when it is alleged by PWs 2 and 3 that accused was seen last in Company of deceased Manjulaben their evidence as to identity of accused cannot be relied upon in the facts and circumstances of the case brought on record. If the evidence of PWs 2 and 3 is not accepted then that circumstance of seen last together loses its significance and is of no avail to the prosecution. So far as extra judicial confession is concerned that also is not acceptable in the facts and circumstances of the case. The learned Judge has therefore erred in relying on these two circumstances. Mr. Thakkar further contended that there is no motive established and or suggested by the prosecution. Mr. Thakkar contended that no doubt absence of motive need not damage the case of the prosecution , however in the facts and circumstances of the case it has and would play importance in the present case. Mr. Thakkar therefore contended that the learned Judge has erred in convicting the accused and there is no question of imposing capital sentence. Mr. Thakkar therefore contended that this appeal be allowed and confirmation case be dismissed.

Mr. Divetia, learned A.P.P. equally seriously relied on the very circumstances which are tried to be struck down by the learned Advocate for the defence. Mr. Divetia contended that there is a cogent and convincing evidence about the identity of the accused by PWs 2 and 3 and they are corroborated by the evidence of identification parade. Mr. Divetia contended that once the identity of the accused is established, then the circumstances of last seen together by itself is sufficient to hold the accused guilty of the offence charged and learned Sessions Judge has rightly done so. Mr. Divetia contended that another circumstance about extra judicial confession is also cogent and convincing and has been rightly relied on by the learned Sessions Judge. Mr. Divetia contended that extra judicial confession before Arjan PW 6 who is an independent person and has no bias in his mind against the accused to wrongly involve him in such a heinous crime. Mr. Divetia therefore contended that conviction is required to be confirmed. Mr. Divetia relying on the judgment in the case of Machhi Singh and Bachan Singh contended that the case would fall within the rarest of rare cases and the conviction of death sentence should be confirmed.

In view of the evidence of Dr. Bhagwatiprasad PW 1 and more particularly when it is not disputed before us

deceased has died a homicidal death. Cause of death which was kept pending at the time when the Doctor submitted the postmortem report is subsequently certified after receipt of the report of viscera that the cause is due to asphyxia due to strangulation. It is not even suggested by the defence that this is a case of suicide. Therefore, we do not refer detailed evidence to hold that deceased died a homicidal death.

If the deceased died a homicidal death, the question is who caused the death. The facts, as stated earlier, the deceased in company of one Rameshbhai checked in a Guest House named Sunil Guest House in Junagadh in the evening at 6.05 of 13th September, 1995. Next day morning when PW 3 Mahesh employee of PW 2 Chasandas went to clean room no.18 wherein the said Rameshbhai and Manjulaben had stayed found dead body of Manjulaben and he accordingly informed his employer PW .2 Undisputedly, Manjulaben has died a homicidal death and no one has seen the commission of the act by which she has died. Thus, undisputedly, there is no eye witness in the present case.

The question is when Manjulaben has died a homicidal death, who caused it? It is the case of the prosecution that it is the accused who brought her from Surat to Junagadh, stayed in Sunil Guest House in the night of 13th & 14th September, 1995 and having killed Manjulaben either in the late night or early morning by about 8 O'clock, went away to Chhatar. He stayed in the guest house with a fictitious name of Ramesh Veljibhai resident of Mota Ankadia Taluka Kukavav, District Amreli from Surat and going to Mota Ankadia. The question, therefore, is whether the prosecution proves by the circumstances that it is accused and the accused alone who stayed in Sunil Guest House as an impostor with the name of Ramesh and after killing his wife left for Chhatar. Undisputedly the case of the prosecution rests solely on the circumstantial evidence to prove the guilt of the accused. Law as to circumstantial evidence on which the conviction can be based is very clear and that is that all the circumstances relied upon by the prosecution must forge such a chain as to support the sole hypothesis that the accused committed the murder(Vidya Sagar v. State of U.P. 1977 SC 1116). According to the said judgment as held in para 11 the circumstances must answer the well established test that circumstances must be consistent with the sole hypothesis that the accused is guilty of the crime for which he is charged. The Supreme Court in the case of Sharad Birdhichand Sarda vs. State of Maharashtra (AIR 1984 SC 1622) in

paragraph 152 has held that in cases of circumstantial evidence if the following conditions are fulfilled then a case against the accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned `must or should' and not ` may be' established. There is not only a grammatical but a legal distinction between ` may be proved' and ` must be or should be proved' as was held by this Court in Shivaji Sahebrao Bobade vs. State of Maharashtra, (1973) 2 SCC 793: (AIR 1973 SC 2622) where the following observations were made:

"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ` may be' and ` must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

In the case of S.D. Soni v. State of Gujarat

(AIR 1991 SC 917) it is held in paragraph 8 that:

"Needless to say that in a case in which the evidence is of a circumstantial nature the facts and circumstances from which the conclusion of guilt is said to be drawn by the prosecution must be fully established beyond all reasonable doubt and the facts and circumstances so established should not only be consistent with the guilt of the appellant but also they must entirely be incompatible with the innocence of the accused and must exclude every reasonable hypothesis consistent with his innocence."

Similar is the view taken by the Supreme Court in the case of Tanviben Pankajkumar Divetia v. State of Gujarat (1997(2) G.L.R. 1346) where in paragraph 45 of that judgment the principle for basing a conviction on the basis of circumstantial evidences has been indicated which reads as under:

" The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between `may be true' and ` must be true' and the same divides conjectures from sure conclusions (Jaharlal Das v. State of Orissa, 1991(3) SCC 27).

Thus, it is clear from the above judgments of the

Supreme Court that to rest conviction on circumstantial evidence each circumstance must be fully established and must forge a chain to support the sole hypothesis of the guilt of the accused. So far as the present case is concerned, the learned Judge has mainly relied on two circumstances as held by the learned Judge to have been duly proved and established. They are last seen together in Sunil Guest House at Junagadh by Chisandas Lahoremal owner of Sunil Guest House, PW 2 and his employee Mahesh Kumar Vallabhbhai, PW 3 and extra judicial confession made by the accused before his father-in-law Hira Puja, PW 5 and his companion Sarpanch Harjanbhai, PW 6. The prosecution has also relied on other circumstances,namely, motive and entry in Sunil Guest House as an impostor.

We will first consider whether the accused and the deceased left Surat in the evening of 12th September, 1995. No doubt the prosecution is not able to prove as all have remained to be an hearsay evidence that the accused left Surat in company of his wife the deceased in the evening of 12th September, 1995. An attempt is made to prove the said fact by evidence of Raghavbhai PW 4 read with evidence of Ketan PW 11. Ketan PW 11 has turned hostile and has not supported the case of the prosecution that the accused left in the evening of 12th September, 1995 in company of his wife for Chhatar. On the contrary he has come out with the case that his uncle the accused had left Surat some 26 days before the date of incident for Chhatar and his father Tulsidas had gone to leave him at Chhatar. We make it clear that Tulsidas is not examined in this case. Therefore, evidence of Ketan PW 11 is of no avail for the prosecution. So far as Raghavji PW 4 is concerned, he has stated that on 13th September, 1995 his nephew Kanti came to inform him that Manjulaben and Kantilal have left home since yesterday without saying anything under the pretext of going to attend some Katha. On inquiry by him from Kantilal he was so informed by Ketan son of Tulsibhai. Ketan PW 11 does not admit these facts, and therefore, say of Raghavji is simpliciter an hearsay evidence not admissible in evidence. Therefore, the prosecution has failed to establish by any evidence much less cogent and convincing that accused left in company of his wife in the evening of 12th September, 1995 from Surat under the pretext of attending some religious story and have not returned back. Therefore, this part of evidence does not lead us even to infer a fact that deceased in company of his wife have left Surat in particular for Chhatar. Now as per the prosecution case, accused had come to Junagadh in company of his wife now deceased Manjulaben, stayed in

Sunil Guest House as an imposter of Rameshchandra Velji and having killed his wife in the night of 13th and 14th September, 1995 the accused has left the Guest House at about 8 O'clock in the morning of 14th September, 1995. Thus, the accused and his wife according to the prosecution were seen last in Sunil Guest House at Junagadh in the evening of 13th September, 1995. The question is whether the persons alleged to have been seen by Chisandas PW 2 owner of Sunil Guest House and his employee Mahesh Kumar PW 3 were accused and his wife Manjulaben. We may make it clear at this stage that though investigated by Investigating Agency as to the identity of the woman found dead in Sunil Guest house being Manjulaben daughter of Hira Puja and wife of the present accused the prosecution has not led necessary evidence to prove the same. We, therefore, allowed the application of the learned A.P.P. to permit him to lead additional evidence by our order of 24th April, 1998 in Criminal Misc. Application no.1400/98. The dead body of a woman was found in Sunil Guest House in the morning of 14th September, 1995 at about 10.00 a.m. when PW 3 was cleaning that room. PW 2 then immediately complained to police. This also came to be a news item in the newspaper of 15th September, 1995. On reading the newspaper and having a tip from his informant that the person who has committed murder of his wife is coming to village Chhatar, Senior PSI Mr. P.M. Patel, PW 15 had gone to Chhatar with the personnels of his staff where he found this accused and was arrested under Section 41 of the Code of Criminal Procedure, 1973 vide Panchnama Exh.27 by 1400 to 1430 hrs.. Prior to this, according to PW 5 he was informed by Vajubhai elder brother of the accused in the morning of 15th September, 1995 that his son-in-law has killed his daughter. He, therefore, in company of PW 6 Sarpanch of his village went to village Chhatar and went to the house of the accused. According to PWs 5 and 6 accused stated before them that he has killed Manjulaben by strangulating her with the aid of rope in Sunil Guest House and her earring and wristwatch are given to his mother. He, therefore, went home i.e. at Vavdi, asked his son to telephone at Surat and sent Dhanjibhai and Naranbhai to collect the corpse of Manjulaben. Accordingly, by additional evidence Dhanjibhai and Naranbhai PWs 22 and 23 respectively were examined and they have deposed before the Court that they have gone to Junagadh and identified that the dead body was of Manjulaben. However, the dead body was handed over to her in-laws, namely, Dhirajlal. The police has obtained necessary receipt for the same. Unfortunately, the learned Judge did not allow the said receipt to be exhibited.However, we ordered to exhibit the same and

read in evidence. According to these two witnesses Exhs.22 and 23 dead body of Manjulaben was taken by her elder brother-in-law Dhirajlal. However, there is no evidence of her cremation in village Chhatar. Simply because there is no evidence of cremation of Manjulaben at village Chhatar by itself does not lead to infer that deceased was not Manjulaben niece of PWs 22 and 23 and wife of the accused. It is not shown anywhere on record that if dead body was not of Manjulaben, then where the wife of the accused has gone? If the dead body found in Sunil Guest House was not of his wife, more particularly when identified by her uncle PW 22 and his cousin PW 23, it is a misfortune of our country that people go to an extent of even disputing the identity of the person who is dead, more particularly, when the dead person is the member of the family. If the woman found in Sunil Guest House was not wife of the accused, then, it was the duty of the accused and his relations to let know the Court as to where his wife is? Incident took place on the night between 13th/14th September, 1995. We have been hearing this confirmation case from 15th April, 1997 and as the additional evidence was recorded hearing was deferred, however, is concluded on 15th September, 1998. Till date in-laws of Manjulaben did not say about the absence of Manjulaben if she is not dead. This reflects on the falling human values and moral standards. Thus, it is clear that the dead body found from Sunil Guest House is proved to be that of Manjulaben wife of the accused.

In view of the above discussion, the woman who entered Sunil Guest House in the evening of 13th September, 1995 as entered in the register of that Guest House was Manjulaben daughter of Hira Puja, PW 5 and wife of the accused. The question is person with whom she entered the Guest House was the accused or someone else. Manjulaben entered the Guest House with a person who has given his name as Ramesh Veljibhai of Mota Ankadia, Taluka Kukavav, District Amreli coming from Surat and going to Mota Ankadia. Whether the person named Ramesh in whose Company Manjulaben has stayed in the Guest House was really Ramesh, some third person other than her husband or was the accused himself with the fictitious name of Ramesh. In the morning of 14th September, 1995 when the fact of a dead body of a woman lying in room no.18 of that Guest House came to be disclosed and the information was given to the police there was bound to be sufficient evidence in form of circumstances, articles, finger prints etc. which could have been collected and identified and led to the identity of person who had stayed in that Guest House with Manjulaben in room no.18, but unfortunately investigation has not proceeded in that

line or collected such evidence. What such evidence could be and how could it be utilized will be discussed here in the later part of the judgment.

According to the prosecution, the person who checked in the Guest House with Manjulaben was the accused and to prove the same prosecution has examined PW 2 and PW 3 who have identified the accused in the court room and their evidence is supported by the evidence of identification parade where also they have identified the accused. The question, therefore, is whether the evidence of PWs 2 and 3 as to identity of the accused established by them is convincing and reliable. If yes, then identity of the accused as the person who checked in the Guest House, be it with the name Rameshchandra is established. As stated earlier, any circumstance on which the prosecution wants to rely must be fully established, meaning thereby, it must be conclusively established without any doubt. It will, therefore, be necessary to read evidence of PWs 2 and 3. Chisandas PW 2 is running a Guest House since about 4 years and there are as many as 38 rooms out of which except 7, the rest are with attached bathroom. He was on the counter in the evening of 13th September,1995 at about 6.05. A passenger came and demanded room no.18. After making necessary entry in the register that room was allotted to them. That entry in the register is at Exh.14. As admitted by him in cross examination, about 25 to 35 persons used to come to his guest house everyday. He had no occasion to see that person who checked-in in the Guest House with the name of Rameshchandra again. According to him on 13th September, 1995 about 35 to 36 persons had come in the Guest House. He admits that he had never seen that person Ramesh prior to that date. He does not remember the face of all the 34 persons who came to his Guest House. He has admitted that in his complaint he has not referred to any description as to either person or clothes of that person who checked-in as Ramesh. Chisandas PW 2 has not given any description either as to height, colour, body of that Ramesh who checked in his Guest House in his complaint. He has simply seen this person at the time when he came to his house in the evening of 13th September, 1995 and asked for room no.18 and he made entry in his register. In our opinion, hardly for few minutes the person would have stood near the counter in the Guest house where Chisandas would be busy for half or more of the time in making entry in the register. Thus, without any special description or a reason or an incident when a person is saying that he can identify a person who is seen only once and for few minutes cannot be accepted. So also is

the case with PW 3. According to PW 3 when he was cleaning the Guest House in the morning of 14th September, 1995 after about 7.30 a person came downstairs and he inquired from which number he comes and that man replied no.18 and told him that he is going out for some work. Thereafter at about quarter to 10 when he opened room no.18 with an intention to clean the same, he found a woman lying dead in the bathroom. So he had an occasion to see that person who replied that he comes from room no.18 to whom he had casually asked and when he is not giving any description of that person in his statement before the police, it will be highly hazardous to accept his evidence to identify a person whom he has seen casually and hardly for a few seconds. Both of these witness i.e. PWs 2 and 3 have identified this accused in the court room but PW 2 had admitted in his cross examination that the accused is sitting separately in the accused dock and he has seen him coming to the Court under police custody. If a person has seen a person coming in custody of police when particularly he is a lone person in custody and secondly when the trial is going there is a lone person sitting in the accused dock and if such person is identified as an accused of the case and the same evidence is to be used as a substantive piece of evidence, in absence of any other convincing evidence as to identity, we are of the view that that evidence being substantive ones by itself does not become untainted and acceptable and is not required to be accepted on its face value.

So far as PW 3 is concerned, he has admitted in his cross examination that accused alone is sitting in the accused dock. Before bringing the accused in the court room I was sitting with accused on a Bench outside the court room. He was present in the court room the previous day and he has seen the accused on the previous day also. Thus, his substantive evidence of identifying the accused in the court room also in our opinion does not remain untainted and cannot be accepted.

The question is whether their evidence is corroborated by the evidence of test identification parade, whether they have identified the accused.

To prove the test identification parade prosecution has examined Jamnadas Executive Magistrate, PW 9, Chandresh a Panch Witness to test identification parade, PW 10, and Investigating Officer Bhagwanbhai Vaja ,PW 18. In our opinion, the whole of the test identification parade has become a farce in the instant case. Necessary precaution required to be taken before

test identification parade are not taken. It is the investigating officer, PW 18, who has managed for holding test identification parade. In cross examination, PW 18, has replied in the affirmative the following question: Whether he wrote to Mamlatdar for arranging the test identification parade after showing the accused to complainant Chisandas and Mahesh? Thus, it is clear from this answer that before test identification parade was held the accused was shown to the witnesses PWs 2 and 3 who were to identify the accused in test identification parade. Even prior to that question the witness has stated in cross-examination as follows: " Accused was in my custody since morning of 16th September, 1995. I have kept him with me during investigation. I have recorded the statement of Mohanlal Lakhanumal. He is neighbour of Sunil Guest House. I recorded the statement at his shop. It is true that when I recorded his statement accused was with me and I had showed him. Reason to show the accused was that if a person who committed the crime is identified investigation may be easier and investigation may go ahead." He does not remember whether accused was shown to complainant and Mahesh at their Sunil Guest House. He is not able to say with certainty that he has not taken accused to Sunil Guest House. He does not remember that he had shown the accused to Chisandas and Mahesh. This part of the evidence of the investigating officer, PW 18, in our opinion, makes the identification parade a farce. It has frustrated the whole purpose of test identification parade. The purpose of test identification parade is to test the memory of the witness as to the person to whom he refers to as the accused is the very person or not. Test identification parade is to be held for the accused who are not known. The factual question, in the present case, is to find out whether the person arrested by the police as accused in this case was the person who checked in in Sunil Guest House in the evening of 13th September, 1995. There are rules as to how test identification parades are to be held and what precautionary measures are required to be strictly adhered to, where one of the measure is to see that identifying witnesses should not have seen the accused while in custody before identification parade is held. It is clear from the evidence of PW 18 that there are all the possibilities of accused being shown to these witnesses prior to test identification parade and the possibility of accused being not shown or not seen by the said witnesses is not ruled out. It is also necessary to see that the witnesses who are to identify the accused have no opportunity to see the person required to be identified. In view of this admission of the Investigating Officer, PW 18, we do not propose to

discuss further the evidence of Executive Magistrate, PW 9 and the Panch Witness, PW 10. Assuming that all the necessary precautions were taken by the Executive Magistrate and the accused is identified by the witnesses , in view of the evidence of Investigating Officer, PW 18, the said test identification parade has become a farce and cannot be relied on.

The Supreme Court in the case of GANPAT SINGH AND OTHERS V. STATE OF RAJASTHAN ((1997) 11 SUPREME COURT CASES 565) has observed at paragraph 3 of the judgment as under:

"3. Having carefully gone through the record we are unable to sustain the above concurrent findings in view of the fact that the evidence of Mohal Lal (PW 10), which materially impinges on the evidence of the sole eyewitness, namely, PW 1 was not considered by the learned courts below from a proper perspective. Admittedly PW 1 did not know the three appellants from before and, therefore, to corroborate his identification in court of the three appellants as the miscreants, the prosecution relied upon his identification of them in a test identification parade held by a Magistrate during investigation. However, the evidence of PW 1 regarding his identification of the appellants in the identification parade loses all its importance and value in view of the evidence of PW 10, the driver of the tempo in which the prosecution claimed the appellants ran away after committing the murder. While supporting the case of the prosecution to the extent that he carried three persons in his tempo from the place where the murder was committed on that fateful night, he stated that he could not identify them due to darkness. In the cross examination he stated that he alongwith Girdhar Gopal (PW 1) and two others, were taken to the police station where three persons were kept detained and that they were asked by the police officers to identify them in jail. It is not in dispute that those three persons were the appellants; and when they were shown to PW 1 who later identified them in the parade no reliance can be placed on such identification and consequently the evidence of PW 1 regarding identification of the appellants in court after one year cannot also be safely relied upon. Incidentally, it may be mentioned that the prosecution did not treat PW 10 as hostile. In view of the evidence of PW 10 the appellants are entitled to the benefit of reasonable doubt."

In the case of HASIB V. STATE OF BIHAR (AIR 1972 SUPREME COURT 282), it has been observed at

paragraph 7 of the judgment as under:

"7. Such tests or parades belong to the investigation stage and they serve to provide the investigating authority with material to assure themselves if the investigation is proceeding on right lines. It is accordingly desirable that such test parades are held at the earliest possible opportunity. Early opportunity to identify also tends to minimize the chances of the memory of the identifying witnesses fading away by reason of long lapse of time. But much more vital factor in determining the value of such identification parades is the effectiveness of the precautions taken by those responsible for holding them against the identifying witnesses having an opportunity of seeing the persons to be identified by them before they are paraded with other persons and also against the identifying witness being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned."

In the case of YESHWANT AND OTHERS V. THE STATE OF MAHARASHTRA (AIR 1973 SUPREME COU8RT 337), it has been observed at paragraph 19 of the judgment as under:

"19. The infirmities in the test identification parade of a previously unknown bearded man, whom even Zingu could only describe as " a guest from Gondia" does make the evidence as to the identity of the bearded man who attacked Sukal with an axe doubtful. Neither Babai nor Jiwan knew him from before and described him as " a new man" The trial Court has also observed that the appellant Brahmanand had a beard. It is clear from the admission of Babaii and Jiwan that Brahmanand was brought by the Police and made to sit outside the Court of the Magistrate where these witnesses also waited before the identification parade began. The Magistrate took no precaution to see whether other similar bearded man joined the parade. There were only five other persons in the parade. Apparently Brahmanand had a tape on his neck at that time. The identification proceeding was, therefore, rightly described by the trial Court as " a farce"

Thus, it is clearly established from the suggestions of the defence in cross examination of PW 18 investigating officer that the accused being seen by or shown to the identifying witnesses prior to holding of test identification parade is not ruled out, and therefore, the evidence as to test identification parade, in our opinion, cannot be relied upon to corroborate the

say of PWs 2 and 3 as to the identity of the accused. As discussed earlier evidence of PWs 2 and 3 of is not otherwise also acceptable and reliable. Thus, it cannot be said beyond reasonable doubt that person who checked in with Manjulaben in the evening of 13th September, 1995 in Sunil Guest House was the present accused with the fictitious name of "Ramesh". Investigating agency immediately on the basis of the address provided in the register had gone to Mota Ankadia where they found that there is a person named " Ramesh" Velji in Mota Ankadia. They have recorded his statement and he is examined as witness PW 14. He was taken to PWs 2 and 3 and was also shown the dead body of Manjulaben. PWs 2 and 3 have denied that this man had checked in in the evening of 13th September, 1995 in the Guest House. PW 14 i.e. Ramesh had denied that the woman who is found dead is his wife. He has stated specifically that he has no concern worth the name in Surat much less he has any shop of cloth in the name of Ravija Emporium. He has never gone to Surat; he is already married; he has two sons and two daughters and the name of his wife is Jayaben and she is very much alive. He has stated that his name is Rameshbhai Valjibhai and not Veljibhai. When PWs 2 and 3 have stated that this man PW 14 has not checked in in the evening of 13th September, 1995 in the guest house, there was no reason for the investigating officer to suspect him and therefore he was discharged.

An unfortunate part in this matter, in our opinion, for which the investigating agency can be blamed is that when it transpired no doubt at the stage of evidence before the Court that Manjulaben wife of the accused has left for Chhatar in company of their neighbour Ramesh Velji vide evidence of Ketan Tulsidas PW 11 Court should have directed for further investigation in that line of prosecution of its own did not arise when not asked for. Pending the trial we think that it was open for investigating agency to inquire about this Ramesh Velji who was running Ravija Emporium and according to Ketan Tulsidas, PW 11, he was their neighbour. They ought to have investigated into the matter. In that situation either Ramesh Velji could have been found and a further clue in the investigation- be it even at the stage of evidence, could have been traced, no doubt with the permission of the court or falsity of statement of Ketan could have been clearly made out. One of the circumstances suggested by the defence was husband and wife would not leave their child who is aged about 3 years alone in the house and go away like this, This argument, however, in our opinion, is based on some misreading of the evidence as it is clear in the evidence

that son Divyesh of the deceased and the accused had already gone to Chhatar in company of his grand uncle Tulsidas.

After the search of room no.18 was carried out some articles named bed-sheet and a towel were produced by the complainant and that bed sheet bore the name" Surat Road, Ramesh Valji, Mota Ankadia, District Amreli" written with the aid of a ballpen. Whether this handwriting is of the accused or not; whether the register initialled by the accused purported to have been by the accused is by the accused or not could have been very easily proved with the assistance of handwriting expert, but no attempt or endeavour by the investigating agency has been made in that direction. Assuming that the accused has left Surat in company of his wife-now deceased initially for Chhatar, Chhatar is under Kalavad Taluka , District Jamnagar. Instead of going to Chhatar they have gone to Junagadh. In Junagadh accused has given the name of Rameshbhai while making entry in the register for room no.18. If Manjulaben knew that her husband is making an entry in a false name and more particularly instead of going to Chhatar they have come to Junagadh and having their minor son at Chhatar, would she not object to this? The matter does not end here by giving a false name to the Manager to enter in the register, but then with a ballpen the name of Ramesh Velji is written on a bed sheet. Why such a name should have been there as apparently deceased has come knowingly with her husband not suspecting anything against her husband. This change in name makes the things suspicious if it is within her knowledge. There is no reason to believe ignorance of deceased on this point. No attempt is made by the investigating agency to find about whether this bed sheet article no.10 belongs to the accused or not. No attempt is made to find out to whom article no.11 towel belongs. Another aspect of the matter is that no other clothes of the deceased are not found. If deceased has come all the way from Surat to Junagadh be it under the pretext of going to Chhatar her in-laws place atleast she will have some pair of clothes to change when they were to stay there. be even for a day, when they were not ordinarily residing there. All these circumstances, in our opinion, suggests some substance in the say of the defence that she might have left in company of someone and husband i.e. accused having left Surat few days prior cannot be ruled out. Thus, evidence of PWs 2 and 3 about identity is not acceptable and cannot be relied on absolutely in the light of this circumstance. Thus, prosecution, in our opinion, has failed to prove the circumstance of last seen together

beyond reasonable doubt. Thus, the prosecution has failed beyond reasonable doubt to prove that it was accused who came with deceased Manjulaben to stay in Surat Guest House in the evening of 13th September, 1998.

This brings us to second piece of evidence,namely, extra judicial confession. He contended that before accepting the evidence of extra judicial confession, it must be established by cogent evidence as to what were the exact words used by the accused and even if so established prudence and justice require that if the person before whom the extra judicial confession is made is related to the victim then as a rule of prudence it should not be made sole ground of conviction, however, the same may be used as a corroborative piece of evidence. Law does not require that the evidence of extra judicial confession should in all cases be corroborated. If extra judicial confession is proved by a witness and his evidence is cogent, convincing and acceptable there would be hardly any justification to not believe such evidence. No doubt extra judicial confession by itself is a weak piece of evidence and if there is any doubt created by the surrounding circumstances reflecting on its voluntary nature, the same should not be relied on. If extra judicial confession is vague and ambiguous it would reflect on its reliability. Bearing in mind these principles, as observed by the Supreme Court, we will now appreciate the evidence as to the same.

The prosecution has tried to prove extra judicial confession made before father of the deceased with whom his friend Sarpanch PW 6 was also present. PW 5 has deposed that " After the incident elder brother-in-law Vajubhai of my deceased daughter came to call me at my Wadi. He told me that my son-in-law has killed my daughter. Then I came from my Wadi to my home. Elder brother-in-law of Manjulaben then left. Our Vavdi Sarpanch Arjun PW 6 and myself went to Chhatar. We went to the house of my son-in-law. There son-in-law was lying down. Father-in-law, mother-in-law and elder brother-in-law were also present there. Then we asked our son-in-law as to where my daughter is. He told me, " I have killed your daughteer-in-law in Sunil Guest House by strangulating her. He has shown some trace of it. The said traces are earring and wristwatch". I asked my son-in-law as to why he killed her and told that he should have handed over to us. On so saying, we came back to Vavdi. In cross examination he has deposed " Vajubhai did not tell me that Kanti has come and utters like a mad man. I had not informed the police that

Vajubhai had told me that Kanti has come and utters like a mad man. I have not stated before the police that I have awaken Kanti and while inquiring of him of the members of the family who were present there told us that he speaks confused and talks nonsense. I have not stated before the police that I asked him why he had come along and where Manjulaben is. On so asking he was replying confused and was not giving clear reply. He has also admitted in cross examination that before police recorded his statement he has not talked to anyone that accused Kantilal has killed. It is undisputed that alongwith this witness PWs 6 Sarpanch of village had accompanied him. The said Sarpanch Arjun Shamji PW 6 has deposed, " On 15th September, 1995 Hirabhai and Vajubhai came to me. Hirabhai told me that my son-in-law had come at Chhatar and Vajubhai had come to call us. I therefore with my motor bike went to Chhatar. When we went home Kantilal was sleeping. He was awaken. Members of his family were present. I asked them as to what Kantilal is doing. They said that he is confused. I therefore awakened Kantilal and asked where Manjulaben is. Kantilal spoke, " I have come after killing Manjulaben by strangulating her in Sunil Guest House, Junagadh." Hirabhai told him to tell the truth. Then Kantilal told that earring and wrist watch are given to my mother. Kantilal's mother told Hirabhai that earring and wrist watch were given to me in the evening. Hirabhai then inquired as to the reason for the same and Kantilal did not reply. They then went near village Panch Devda to phone uncle Raghavbhai. Raghavbhai was informed about the incident by phone.....Thereafter on that very day I went to Kalavad. I went there to file a complain. There police had apprehended Kantilal. In cross examination he has admitted that when we went Kantilal was sleeping and was not replying properly. After some time interrogation of Kantilal commenced. Till that time he had not replied about the incident. He again started to talk with us. Till that time we had not talked anything else. Members of the family of Kantilal told us that Kantilal speaks nonsense, meaning thereby, that he was talking meaningless .....I did not give any statement before Kalavad Police Station. When we came to Kalavad from Chhatar we had felt that some serious offence is committed. I read newspaper. Newspaper was received at 2 O'clock in the noon. I read the same. On reading the same I felt that the incident refers to Manjulaben. After reading the newspaper, I did not again go to Kalavad Police Station. He has admitted not to have stated before the police that the mother of Kantilal told us that he has given earring and wrist watch. If we read the evidence of investigating officer, P.W.18, Hirabhai

Pujabhai PW 5 has stated before him that Vajubhai had told him that Kantilal has come and utters like a mad man. He has also stated before him that Kantilal was awaken and when we were questioning him, all the members of the family who were present there, told us that he is confused and talks nonsense. He has also stated before him that when he asked why he had come alone and where Manjulaben is, he was confused and was not replying clearly. The statement before PWs 5 and 6 is relied on by the prosecution as extra judicial confession. This extra judicial confession is made by the accused according to the prosecution before his father-in-law and his friend Sarpanch of Vavdi and attending circumstances to accept this extra judicial confession, in our opinion, is handing over of earring and wrist watch to mother of accused. To confirm whether what accused has said is true, accused has said that he had given earring and wrist watch of the deceased to his mother and the mother had admitted the same by saying that he(accused) had given the same to her in the evening of previous day. Unfortunately, the investigating agency has not cared to to verify this fact and if found true to seize the said articles though they have with them this information atleast on 17th September, 1995.

Before acceptance of this extra judicial confession made before PW 5 father-in-law and PW 6 Sarpanch of the village and a friend of father-in-law, it is relevant to look into the attending circumstances. Before we look into the same one thing can be said to be clear that as per PWs 5 and 6 accused has made an extra judicial confession and they very well knew that Manjulaben daughter of PW 5 is killed by strangulation by her husband and the dead body is lying at Sunil Guest House, Junagadh. According to PWs 5 and 6 after accused made extra judicial confession before them they went to Panch Devdi to telephone at Surat. Brother Raghavji PW 4 in his evidence has stated that on 15th September, 1995 there was a phone from Arjunbhai from Vavdi that Manjulaben is killed by strangulating her with rope. He, therefore, counter inquired to first confirm it and tell him again. They have telephonically informed Raghavji PW 4 that Manjulaben is killed by strangulation in Sunil Guest House at Junagadh. PWs 5 and 6 knew from accused himself, according to their say, that it is accused who has killed her. They have not told Raghavji PW 4 that it is accused who has killed Manjulaben. Thus, not disclosing the name of the accused in telephonic message to Surat by PWs 5 and 6 makes that alleged extra judicial confession a suspicious one. There is another circumstance, in our opinion, and that is that if a

father hears from the mouth of son-in-law that he has killed his daughter by strangulation and that the dead body is lying at Sunil Guest House, Junagadh, and particularly when Sarpanch who is considered to be a friend, philosopher and guide and particularly in this case when PW 5 has asked him to accompany him as a friend with vehicle would normally go straight to a police station either at Kalavad under which villages Chhatar and Vavdi are situated or he would go straightaway to Sunil Guest House, Junagadh and inform the police there. This, in our opinion, would be be the normal behaviour and conduct of a citizen be it illiterate,however, when accompanied by a Sarpanch. They did not go to police. They simply went home and in the evening when PW 6 when went to Kalavad Police Station, simply returned back on having learnt that accused is arrested by the police.

One more circumstance, in our opinion, is that Vajubhai elder brother-in-law of deceased is not examined in this case. Therefore whether these PWs 5 and 6 had gone to Chhatar and they had inquired from the accused about the daughter of PW 5 becomes doubtful particularly, in view of their subsequent conduct, referred above, of not going to police station at Kalavad and/or at Junagadh and not disclosing the name of the accused when they telephoned PW 4 at Surat. An additional circumstance in our opinion is that when PWs 5 and 6 have gone together to the house of accused, we fail to under as to why was it necessary for each of them to inquire separately and in succession from Kantilal son-in-law of PW 5 as to whereabouts of Manjulaben. When PW 5 inquired PW 6 was present there and was hearing the conversation between PW 5 and the accused. Why was it necessary for PW 6 to ask again as to what happened to the daughter of Hirabhai or as to where is Manjulaben. When on inquiry by PW 5 the accused had replied that he has killed his daughter what made PW 6 to again ask the accused to tell the truth and insist for the true story. It is not known as to at what point of time Raghavji received phone at Surat on 15th September, 1995, be it that after reading the newspaper he would have inquired from PW 5 and in turn he may have been asked to inquire from Surat as to whether Manjulaben is there or not and then PW 6 went to the Police Station. PW 6 has not stated before the police that the mother of Kantilal-the accused told him that earring and wrist watch were given to her by the accused. A person can repose confidence in his father-in-law to clean his breast where father-in-law would not be adversely interested. A person would normally not repose confidence in the friend of his father-in-law particularly when he is a person in authority like

Sarpanch for disclosure of fact which is to adversely affect the father-in-law. The Supreme Court in the case of JASPAL SINGH ALIAS PALI V. STATE OF PUNJAB (((1997) 1 SUPREME COURT CASES 510) at paragraph 15 of the judgment has observed that:

"15. The third contention of Mr. Sodhi viz. that it is highly improbable that Jaspal Singh(A-1) would have gone to this witness along with his co-accused to confess the guilt, is equally formidable. Chhota Singh (PW 7) has not given any reason as to why and how Jaspal Singh(A-1) and other co-accused have reposed such a confidence in him and confessed their guilt. After going through the evidence of Chhota Singh (PW 7), we do not find it safe to hold any of the appellants guilty in the present crime"

Thus, in our opinion, also reading together with the attending circumstances referred herein and our discussion, wee find that extra judicial confession of the accused before PWs 5 and 6 is improbable and cannot be relied upon.

Investigating Agency, in our opinion, has not led any evidence to show since when the accused was in Chhatar. It is true that the investigating agency is not required to disprove the plea of alibi but when they say that accused has gone from Junagadh to village Chhatar they ought to have collected some evidence to show that since when he is in village Chhatar. Not only that, it was the duty of the prosecuting agency to bring on record necessary evidence to show that till the evening of 12th September, 1995 the accused was in Surat. Here, in the instant case, the investigating agency could have investigated into the matter most scientifically also. They could have gathered finger prints, hairs from the room, handwriting from the register as well as bed sheet. Woman having stayed overnight in the guest house, the agency could have searched for hymen or semen stains in the sheets of the guest house. It is said that even a hair of a person be of any part of the body is not identical with the other person and from a hair a person can be identified and prove to have entered in that room. We do not know, when, in our country investigating agency would be able to pace with the advanced technology and science in investigation. We hope that the State will train persons in the line of investigation and hold regular workshops for the same and train them to make that training of practical use. Officers concerned should be made aware and correct them of any observation of the court about the fault in the investigation. If

the observations of the Court are not considered seriously and acted upon by the State, it can be said that State is a party to that fault and this would encourage the growing inefficiency and irresponsibility in the investigating force. It has been said time and again that for investigation and for law and order there should be separate police force but it appears that it has fell on the deaf ears of the government and no attention is paid towards the same.

The learned Judge has relied on the circumstances which according to her makes the full and complete chain leading to the hypothesis of guilt of the accused. In view of the above discussion, in our opinion, none of those circumstances referred to at page 204 of the paper book are fully and conclusively established. So far as as the circumstances nos. 1, 2,3, 4,5 are concerned, they are not proved as identity of the accused is not established beyond reasonable doubt. So far as circumstance no.6 is concerned, it is for the first time that the father says before the Court about the harassment of his daughter and that also in our opinion is not established. So far as the circumstance no.7 extra judicial confession is concerned there being variance in the same before PWs 5 and 6 it will be improper to rely on it. So far as the last circumstance no.8 is concerned, there is no doubt that the deceased died of asphyxia due to strangulation but that by itself is not a circumstance to link the accused with the commission of the crime.

The learned Advocate for the defence has referred to the following circumstances which will make the accused entitled to benefit of doubt. They are (i) there is no eye witness, (ii) there is no motive established by the prosecution, much less a strong motive to kill a person, (iii) the evidence of identification is defective, (iv) investigating agency has not taken necessary finger prints, (v) investigating agency has not taken opinion of the handwriting expert for the writing in the register as well as in the bedsheet, (vi) no attempt is made to collect hair sample, (vii) investigating agency has not adopted any of the scientific method for investigation, (viii) extra judicial confession apart from being highly improbable suffers from contradictions, (ix) the father of the deceased i.e. PW 5 has stated before the police that the accused was unable to speak coherently, (x) PWs 5 and 6 have not disclosed before the police about the extra judicial confession for two days though immediately on extra judicial confession being made by the accused

Sarpanch PW 6 has gone to the police immediately, (xi) investigating agency has not collected nor made any attempt to collect articles, namely, earring and wrist watch to give the ring of truth to the extra judicial confession made before PWs 5 and 6, (xii) PSI Kalavad, PW 15 has stated that neither PW 5 nor PW 6 had come to police station to lodge a complaint, (xiii) there is unexplained delay, more particularly, of three days in recording statement of PWs 5 and 6, (xiv) PW 5 has not made any attempt to verify the correctness of confessional statement from Junagadh and has also not cared to take the dead body or to file a complaint on hearing the news, (xv) PWs 5 and 6 have stated before the police not of their own but when they were called and that too on 17th September, 1995, (xvi) prosecution has not led any evidence as to why Manjulaben accepted registration in false name.

All these circumstances make the prosecution story improbable. Keeping in mind all these circumstances and discussions hereinabove, when none of the circumstances is conclusively proved against the accused, the accused is entitled to the benefit of doubt.

As we are convinced that prosecution has failed to prove the circumstances alleged beyond reasonable doubt the question of capital sentence does not arise.

Even if we would have accepted the prosecution story as it stands the case of the accused would not fall within the category of the rarest of rare cases. The proper guideline is given by the Supreme Court as to when a case would fall within the category of rarest of rare cases in the judgments in the cases of MACHHI SINGH AND OTHERS V. STATE OF PUNJAB (AIR 1983 SC 957) & KEHAR SINGH V. STATE (DELHI ADMN.) (AIR 1988 SC 1883) and the one before us does not fall within the said category, and therefore, we would not have agreed to confirm the capital sentence.

In view of the above discussion, we pass the following order:

The appeal is allowed. Conviction under Section 302 of the Indian Penal Code of the appellant accused is set aside. Reference made by the learned Sessions Judge under Sec.366(1) of the Code for confirmation of death sentence is refused. The accused be set at liberty forthwith, if not required in any other case. Fine if paid be refunded.

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sf-sms